IN RE LOH KAH KHENG

HIGH COURT MALAYA, PULAU PINANG
MOHAMED DZAIDDIN J
[PENYEMAKAN JENAYAH NO. 43-10-89]
20 OCTOBER 1989

CRIMINAL PROCEDURE: *Revisionary powers of High Court Judge - Section 341A Criminal Procedure Code - Inquest to determine cause of death - Police receiving information during investigation of murders - Information relates to commission of a crime - Whether information given in official confidence - Whether information should be divulged at inquest - Objection to disclosure - Whether privileged information - Sections 124, 125, 126 Evidence Act 1950.*

EVIDENCE: *Privileged information - Occasion for claiming privilege - Whether communication made to a public officer in official confidence - Certification in writing from Head of Department whether disclosure would be detrimental to public interest.*

The learned Judge of the High Court called up the record of the Magistrate's inquest under s. 341A of the Criminal Procedure Code in the exercise of his revisionary powers to satisfy himself as to the correctness, legality, or propriety of any finding, sentence or order recorded or passed. The main question for the Judge to consider was whether the order, made by the lower Court, should be interfered with in the interest of justice. The matter came up for revision from the following events which occurred during the inquest. At the inquest, a police officer, DSP Eric Foong informed the Court that during an investigation of the murder, the police received information from a police informer which related to a commission of a crime in connection with the death of the deceased. The information was said to have been given in official confidence and recorded in writing by another police officer, ACP Raja Lope Ahmad. An application was made for the information to be divulged at the inquest. The officer assisting in the inquiry objected to disclosure of the information on the ground of privilege under ss. 124 and 125 of the Evidence Act 1950. The learned Magistrate ruled that the said written information could not be disclosed at the inquest, but held that it should be shown to her for her own consumption.

Held:

[1] The occasion for claiming privilege under s. 124 of the Evidence Act 1950 arises only when the evidence sought to be given is a communication made to a public officer 'in official confidence'.

[2] The Magistrate must decide whether or not the communication was made in official confidence and this can be done not only by inspecting the document but can also take 'other evidence' to determine on its admissibility (s. 162(2) Evidence Act).

[3] If the Magistrate determines that the communication was not made 'in official confidence', then the occasion for claiming privilege is non-existent.

[4] If the communication was made in official confidence, then the decision rests exclusively with the head of department of the officer concerned to withhold or allow disclosure depending on whether or not it would be prejudicial to the public interest.

[5] The learned Magistrate was correct in her ruling that the written information be examined by her for her own consumption which would enable her to form an opinion as to the cause of death.

[6] The Magistrate holds an inquiry by examining witnesses on oath and while usually following the ordinary rules of evidence, he may admit any evidence which he thinks fit, especially hearsay evidence. His duty is to ascertain the cause of death and he is not bound to follow the usual procedure of law Courts.

[7] Magistrate's first ruling overruled, with a direction to record further evidence in order to comply with s. 124 Evidence Act, before making any ruling for the non-disclosure of the written information:

Magistrate's second ruling affirmed.

[Order accordingly.]

Legislation referred to:
Criminal Procedure Code, s. 341A, Chapter XXXII, ss. 328, 337
Evidence Act 1950, ss. 124, 125, 162, (2)

Other source referred to:
Sarkar's Law of Evidence, 13th Edition, p. 1230
Mallal's Criminal Procedure, 4th Edn., p. 485

For the public prosecutor - Mohd. Zabidin bin Mohd. Diah
For Tan Sri Loh Boon Siew - Ghazi bin Ishak with Khoo Boon Chye; M/s. Presgrave & Matthews
For the widow - Vijendran with C.P. Mahendran; M/s. R.R. Chelliah Brothers
For Jefri Yap - Ranjit Rai Sharma; M/s. Sharma & Jaafar

JUDGMENT

Mohamed Dzaiddin J:

In the exercise of my revisionary powers under s. 341A of the Criminal Procedure Code, I called for the record of the Magistrate's inquest after being notified in writing by the deputy public prosecutor and Encik Ghazi Ishak, one of the Counsel holding watching brief, that they were dissatisfied with the ruling made by the Magistrate on 27 September 1989 in an inquest to determine the cause of death of Loh Kah Kheng ("the deceased"), the son of a well-known philanthropist, Tan Sri Loh Boon Siew.

The Facts

The record of the proceedings of the Magistrate's inquest showed that on 14 September 1989, DSP Eric Foong, the Deputy OCCI Penang, testified that he assisted in the police investigation into the death of the deceased. To a question by Encik Vijandran, he said he could not disclose whether there was any information of murder although an investigation of murder was still continuing. Counsel then applied to the Magistrate to stop the inquest in view of DSP Foong's evidence because police investigation of the case has not been closed. The Magistrate then adjourned the inquiry to 27 September 1989 to enable the parties to make their submissions on this issue.

However, when the inquiry resumed on 27 September, DSP Ismail, the officer assisting in the inquiry applied to recall DSP Eric Foong to clarify about the murder investigation. DSP Foong testified that in the course of his investigation, he received certain information from a police informer concerning the deceased's death, which related to a commission of a crime. The information was given in official confidence and recorded in writing by his former superior officer, ACP Raja Lope Ahmad and only both of them had access to the said information. At this juncture, both Encik Vijandran and Encik Ghazi applied for the information to be divulged as they felt that it would assist the Magistrate in determining the cause of death.

DSP Ismail, on the other hand, objected to its disclosure on the ground of privilege under ss. 124 and 125 of the Evidence Act 1950. The learned Magistrate ruled that the said written information could not be disclosed at the inquest, but held that it should be shown to her for her own consumption.

Submission

At the hearing of this revision on 13 October I entertained further submissions of the DPP and Counsel after studying the grounds of the Magistrate's ruling. Encik Zabidi submitted that the Magistrate was correct to prohibit public disclosure of the said information on the ground of privilege. However, he contended that she was wrong in her second ruling ordering the information report to be shown to her. The learned Mr. Deputy felt that it might prejudice and influence her verdict. At any rate, he was of the view that the information by itself was hearsay and inadmissible.

Both Encik Ghazi and Encik Vijandran urged me to overrule the Magistrate's decision by ordering a full disclosure of the said information in the interest of justice. Encik Ghazi submitted that the Magistrate was wrong in her rulings without first satisfying herself that the information came under s. 124 of the Evidence Act 1950 and if so, whether the proviso to the said section had been satisfied. She had also prematurely made the ruling without inspecting the information in compliance with s. 162 of the Evidence Act 1950 to determine its admissibility. Encik Vijandran contended that on the basis of DSP Foong's evidence, the issue of confidentiality under s. 124 had already lost and unless the document was disclosed fully it would have a prejudicial effect on the verdict.

Conclusion

The object of a revision is to satisfy the Judge as to the correctness, legality, or propriety of any finding, sentence or order recorded or passed. "In a revision, the main question to be considered is whether any order made by the lower Court should be interfered with in the interest of justice" (*PP v. Kulasingam* 2 MLJ 26). Therefore, with these principles in mind, I shall now proceed to examine the Magistrate's rulings.

First, on the Magistrate's ruling that the written information in the custody of DSP Eric Foong be not disclosed, I am of opinion that although she was right in her decision, she had however acted prematurely in arriving at the decision because she failed completely to consider the provisions of ss. 124 and 162 of the Evidence Act.

Section 124 provides as follows:

> No public officer shall be compelled to disclose communications made to him in official confidence when he considers that the public interest would suffer by the disclosure:
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> Provided that the Court may require the head of the department of the officer to certify in writing whether or not such disclosure would be detrimental to the public interest and, if the head of the department certifies that such disclosure would not be prejudicial to the public interest, then the officer shall disclose the communications.

The commentary in *Sarkar's Law of Evidence,* 13th Edn., p. 1230 says that the occasion for claiming privilege under s. 124 arises only when the evidence sought to be given is a communication made to a public officer "in official confidence". That is the condition precedent before privilege can be claimed. Therefore, the important question to be decided first by the learned Magistrate is whether or not the communication was made to DSP Foong "in official confidence". The Court is the sole judge of this question. This she can decide not only by inspecting the document, but can also take "other evidence" to determine on its

admissibility (s. 162(2)). If she determines that the communication was not made "in official confidence", the occasion for claiming privilege is then non-existent. Further, the proviso to our s. 124 states that the Court may require the head of the department of the officer to certify in writing whether or not such disclosure would be detrimental to public interest. If the Court holds that the communication was made in official confidence, it rests exclusively with the head of the police department to withhold or allow disclosure depending on whether or not it would be prejudicial to the public interest. From her grounds of decision, the learned Magistrate had clearly failed to consider and apply the two conditions precedent in arriving at her ruling.

In the result, I am compelled to overrule her first ruling and direct her to record further evidence in order to comply with s. 124 of the Evidence Act before making any ruling for the non-disclosure of the written information.

On the second count, in the light of the primary function of a Magistrate in an inquest to inquire into the cause of death, in my judgment, she was correct in her ruling that the written information be examined by her for her own consumption. It is clear from her grounds of decision that the second ruling was made to enable her to form an opinion as to the cause of death. It must be remembered that the function of a Magistrate holding an inquiry under Chapter XXXII of the Criminal Procedure Code is to inquire, when, where, how and after what manner the deceased came by his death and also whether any person is criminally concerned in the cause of such death (s. 337). The "cause of death" is defined under s. 328 to include not only the apparent cause of death as ascertainable by inspection or post-mortem examination of the body of the deceased, but also all matters necessary to enable an opinion to be formed as to the manner in which the deceased came by his death and as to whether his death resulted in any way from, or was accelerated by any unlawful act or omission on the part of any other person. Hence, the Magistrate holds an inquiry by examining witnesses on oath and "while usually following the ordinary rules of evidence he may admit any evidence which he thinks fit, especially hearsay evidence. His duty is to ascertain the cause of death and he is not bound to follow the usual procedure of law Courts" (*Mallal's Criminal Procedure*, 4th Edn., p. 485). In the present proceedings, there is before the learned Magistrate evidence in the nature of an information which could perhaps shed some light as to the cause of death of the deceased. I am, therefore, of opinion that so long as the learned Magistrate was satisfied that there was evidence, in whatever form or manner elicited and whether admissible or not, which could assist her in establishing the cause of death of the deceased, she was perfectly entitled to know and take cognizance of it.

I am grateful to the DPP and Counsel for assisting me in this revision.

Also found at [1990] 1 CLJ 823